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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 SECURITIES AND EXCHANGE
COMMISSION,

4 Plaintiff,

5 v.

17 Civ. 139 (GHW)

6 GREGORY T. DEAN AND DONALD J.
7 FOWLER,

8 Defendants.

9 -----x

New York, N.Y.
November 14, 2017
9:30 a.m.

10
11 Before:

12 HON. GREGORY H. WOODS,

13 District Judge

14 APPEARANCES

15 DAVID STOELTING
16 KRISTIN M. PAULEY
THOMAS P. SMITH
17 Attorneys for Plaintiff

18 McCORMICK & O'BRIEN L.L.P.
Attorneys for Defendants
19 BY: LIAM O'BRIEN

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1 (Case called)

2 THE COURT: This is Judge Woods. Do I have counsel
3 for plaintiff on the line?

4 MR. STOELTING: Yes, your Honor. Good morning. It's
5 David Stoelting, Kristin Pauley and Tom Smith for plaintiff.

6 THE COURT: Do I have counsel for defendants on the
7 line?

8 MR. O'BRIEN: Good morning, your Honor. Liam O'Brien
9 for defendants.

10 THE COURT: Thank you. I scheduled this conference to
11 discuss the November 7 letter submitted by the parties. I
12 scheduled a prior conference. I understand that one of the
13 parties was not available to proceed at that time, so I
14 rescheduled today's conference.

15 Since the submission of the joint letter on the 7th
16 there has been some exchange of correspondence regarding
17 potential sanctions related issues. I'll hear from each of you
18 with respect to those issues as well if you are prepared to
19 begin to discuss them. I can tell you that I do not expect to
20 rule on any motion for sanctions during this conference. Any
21 information that you give me with respect to the sanctions
22 issues will really just be for context to begin the examination
23 of those issues.

24 The issue that was raised in the initial letter is the
25 request by the SEC for leave to quash the 17 nonparty subpoenas

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1 That addresses the subpoenas.

2 Let's talk about the sanctions issues that have been
3 raised by counsel for plaintiff. There are two sets of issues.
4 As I said, I don't expect to rule on these motions now. They
5 raise significant questions and I expect to invite full
6 briefing on them. But in order to decide on the appropriate
7 course of action I'd like to hear from each of you now since we
8 are all on the line.

9 Let me begin with counsel for the SEC. Counsel.

10 MR. STOELTING: Thank you, your Honor. There are two
11 aspects of the defendant's conduct here that are the basis for
12 this request. The first is spoliation of evidence. And Rule
13 37(e) says quite clearly that electronically stored information
14 needs to be preserved. The plaintiff issued the document
15 request to defendants in April 2017 calling for all documents
16 concerning the customers, all documents concerning
17 communications with the customers. Documents -- I don't think
18 there is any dispute, encompasses audio recordings.

19 Mr. Dean was then deposed in July 2017. He did not
20 mention anything about recordings during his investigative
21 testimony in 2014, at a time when he was still working at JD
22 Nicholas. He did say that he occasionally recorded
23 conversations but that he had not done so in three years and
24 that he has thrown out all of the recordings that he did have.

25 After Dean's deposition was completed in July 2017, he

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1 did not mention anything about recordings. There was no
2 recordings produced to us.

3 THE COURT: I'm sorry, counsel. Can I pause you for a
4 moment. The 2014 statement was made under oath, is that
5 correct?

6 MR. STOELTING: Yes, it was under oath. Mr. Dean had
7 counsel with him at that testimony session.

8 THE COURT: Thank you. Proceed. This is.

9 MR. STOELTING: The SEC had no knowledge that any
10 recordings had been located or discovered by Mr. Dean or
11 Mr. O'Brien was aware of any recordings until the Eugene
12 Bernardo deposition in Chicago on October 3 when at the very
13 end of that deposition Mr. O'Brien pulled out his laptop and
14 began playing a recording of the conversation between
15 Mr. Bernardo and Mr. Dean. Over our strenuous objections
16 Mr. O'Brien continued with the recording and the objections
17 were because we had never been provided with these recordings,
18 did not even know they existed.

19 It turns out several days before Mr. O'Brien had
20 e-mailed to us or tried to e-mail to us several audio
21 recordings which were very large files that did not get through
22 our system, as is very common. Our e-mail system blocked
23 e-mails with large files. In any event, there had been no
24 other disclosure to us about the recordings from the time they
25 were discovered by Mr. Dean in early August until, at the

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1 earliest, late September. So that's a period of about eight
2 weeks. I'll just emphasize that the SEC's document request
3 from April 2017 says the request is ongoing in nature,
4 responsive documents should be produced as they are found.
5 What should have happened is, we should have been alerted
6 immediately to the discovery of the recordings in early August,
7 but that did not happen.

8 Once we finally got Mr. O'Brien to tell us that the
9 recordings had been discovered by Mr. Dean, we then said we
10 want Mr. Dean to come in and tell us about the discovery of the
11 recordings. Your Honor will remember that this came up in the
12 October 16 court conference where at the very end of that
13 conference I told the Court about this issue and that Mr. Dean
14 had agreed to come in for another deposition that took place
15 after the close of the deposition cutoff on October 27.

16 When Mr. Dean appeared in our offices on October 27
17 for that deposition, we learned for the very first time what
18 had actually happened. And he testified that he had found the
19 recordings in a box in his garage and he has no understanding
20 of how that recording device got in his garage. But he came
21 across it in early August. And then he said he listened to it
22 and made a judgment himself about which recordings were
23 relevant and which were not. He transferred them to some other
24 medium, either a disk or a flash drive, and then gave that disk
25 or flash drive to Mr. O'Brien and then at that point threw the

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1 original recording device into the trash.

2 We argue that there is certainly a failure to preserve
3 the electronic restored information on the device. There was a
4 failure to disclose to the SEC promptly the discovery of the
5 recordings. There was a failure to disclose to the SEC the
6 destruction of the original device. We have asked Mr. O'Brien
7 to provide to us the format in which he received those
8 recordings from Mr. Dean, but we have not received a response
9 to that request.

10 And it seems like one of the many problems that arise
11 from this is that Mr. Dean, the defendant, is the one who made
12 the judgment about what recordings were relevant and what were
13 not before transferring them to something else and then giving
14 them to his lawyer. In my mind, there is still a little
15 fuzziness about when Mr. O'Brien learned of the original
16 device, whether he was aware of its destruction at the time or
17 not, or whether anyone other than Mr. Dean listened to the
18 original recording before it was destroyed.

19 In addition to just not being able to listen to those
20 original recordings and to assess the metadata, there would
21 have been information on that metadata that we would have liked
22 to have known, such as the caller name, the numbers that were
23 involved, and other information that would appear in metadata
24 on audio recordings. We are basically left to trusting
25 Mr. Dean's version of events that he put all relevant

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1 recordings onto the second device and that that was transmitted
2 to Mr. O'Brien. Obviously, Mr. Dean is someone who has an
3 interest in the outcome of the litigation. So we are not
4 comfortable relying on his representation that all recordings
5 were preserved and, in fact, we will never know that.

6 Certainly the fact of the destruction had to have been
7 known to Mr. O'Brien in early August. We have asked him
8 repeatedly why were we not immediately told about the
9 recordings when they were discovered. And we have just never
10 gotten an answer from him about why he waited eight weeks to
11 disclose to us the existence of these recordings.

12 The second issue actually --

13 THE COURT: Let me pause you on this. Mr. O'Brien, do
14 you care to comment on this issue? At the outset can I hear
15 when you first learn of the existence of these recordings.

16 MR. O'BRIEN: Your Honor, I don't think the
17 characterization that we have been asked repeatedly is true.
18 As best as I know, we have only been asked once. We can't lock
19 in a definite date. My client advises me that he discovered
20 the recordings in early August and at some point brought those
21 to my attention. I told him to send those to me. We don't
22 definitively know when we received them. I know I was away for
23 part of the time. I know my client was away for part of the
24 time.

25 We certainly received the recordings sometime in, I

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1 would say, early September, but, again, that is a best guess.

2 We transmitted when we were preparing for the Bernardo
3 depositions. We e-mailed those recordings to the SEC. We did
4 not get any bounce-back notice from the SEC. And we assumed
5 that they then had the recordings in advance of the deposition.

6 THE COURT: Do you have the medium that your client
7 used to transmit the recordings to you, the physical medium?

8 MR. O'BRIEN: We believe it was a disk. We are trying
9 to locate that disk, but we have not located it yet. And with
10 respect to the destruction of the recording device or the
11 storage device, we did not know that our client had destroyed
12 that piece of equipment until right before the deposition.

13 THE COURT: Anything else on this point at this time,
14 Mr. O'Brien?

15 MR. O'BRIEN: No, your Honor.

16 THE COURT: Counsel for plaintiff, would you mind
17 proceeding to the second issue.

18 MR. STOELTING: Yes, your Honor. As your Honor will
19 recall, at the October 16 hearing, which was in response to
20 Mr. O'Brien's motion to quash the SEC's deposition subpoena
21 served on Dr. McCoy, and Mr. O'Brien's argument at that time
22 both in the joint letter and before the Court was that he could
23 not -- he thought it was unfair for us to proceed with the
24 McCoy deposition when he did not have McCoy's tax returns and
25 documents concerning other arbitrations that McCoy may have

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1 to Dr. McCoy that I did not -- I did not believe that to be the
2 case, but I did not want to affirmatively state that that was
3 not the case.

4 In fact, we took over the representation of our
5 clients, Gregory Dean and Don Fowler, from Ian Frimet, the same
6 attorney who represented Dr. McCoy in his arbitration against
7 Craig Scott Capital. So I wanted an opportunity to confirm
8 that in fact those records had never been turned over to us by
9 Dr. McCoy's prior counsel and by Mr. Dean and Mr. Fowler's
10 prior counsel, Ian Frimet.

11 Subsequent to the depositions, when we got back to New
12 York, we conducted a search and we were able to confirm that
13 Ian Frimet had not in fact turned over the McCoy arbitration
14 records to us at any point, and we were able then to also pull
15 the entire file from the McCoy/Craig Scott Capital file from
16 the archives and produce that to the SEC.

17 THE COURT: Thank you.

18 Let me ask the parties about how we should proceed
19 going forward. The first issue with respect to the alleged
20 spoliation of evidence is one that we will need to address and
21 I'll need to decide before trial.

22 Counsel for the SEC, what is your view regarding the
23 appropriate timing for a motion with respect to that issue?

24 MR. STOELTING: Well, we can be prepared to submit a
25 full motion in the next couple of weeks, fleshing out the full

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1 record on the spoliation issue. I was a little concerned to
2 hear, you know, some pretty vague answers from Mr. O'Brien
3 about when he learned of the destruction, when he received the
4 recordings, and what form he received them. As I mentioned, we
5 had asked Mr. O'Brien for the recordings in the format that he
6 received them from Mr. Dean. If that item has now gone
7 missing, which it appears to have, it appears to have gone
8 missing as well, I think that's an additional concern and
9 additional failure to preserve electronically stored
10 information.

11 THE COURT: Thank you. Let me just address that
12 briefly. I intended to do it later in the conference, but this
13 may be an opportune time.

14 Mr. O Brian, you were under an obligation to maintain
15 that record. I'm ordering you not to destroy, dispose of the
16 medium that your client used to transmit this evidence to you.
17 I was somewhat concerned by the fact that it has gone missing.

18 I don't know the size of your office or the
19 circumstances in which that took place. But in addition to
20 your ethical obligations, because of the importance of this
21 material for discovery in this case, I'm ordering you not to
22 destroy or delete the medium that was used to transmit the
23 information to you.

24 MR. O'BRIEN: We understand that, your Honor. Often
25 when disks come into our office, our admin, particularly if

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1 it's electronic, loads the records onto the system, and so we
2 don't necessarily keep all the disks we receive because it's
3 often discovery, etc. that we receive from other parties. But
4 we are trying to locate the disk.

5 THE COURT: Thank you. You clearly have the sense of
6 the significance of this question and at least the appearance
7 of perhaps improper handling of the materials in the event that
8 that disk also goes missing. I hope that you will conduct a
9 diligent search for it. How large is your office, Mr. O'Brien?

10 MR. O'BRIEN: We are 12 attorneys and one admin and
11 one paralegal.

12 THE COURT: Thank you. I hope with an office of that
13 size that you will be able to solve this mystery in a short
14 period of time.

15 Counsel for plaintiff, let me turn back to you. I
16 appreciate that this is an issue that I am going to need to
17 decide before trial. Is there any benefit to front-loading
18 this motion? In other words, is this an issue that the Court
19 will be considering in the event that there is a summary
20 judgment motion? I don't know if there is a summary judgment
21 motion here.

22 The ultimate question is, is this a motion that should
23 be briefed now or should it be briefed simultaneously with or
24 following a summary judgment motion, if there is one? If there
25 is no summary judgment motion anticipated, then I would expect

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1 that we would set a briefing schedule for this so I can resolve
2 this promptly in anticipation of our trial.

3 What is your view, counsel for plaintiff?

4 MR. STOELTING: Well, your Honor, after just
5 reflecting for a moment, I think that it probably does not to
6 be front-loaded and that we could -- the summary judgment
7 deadline is January 10. We are still assessing the evidence.
8 And in the event we do make a summary judgment motion, we could
9 fold the sanctions issues up with summary judgment. And if we
10 don't make a summary judgment motion, we can still file the
11 sanctions motion on January 10. I think if there is a summary
12 judgment motion, the Court may benefit from kind of a broader
13 view of the allegations and the evidence within the context of
14 the sanctions issue. My suggestion would be to give us until
15 January 10, the summary judgment deadline, and then we can make
16 a summary judgment motion and sanctions or sanctions only at
17 that time.

18 THE COURT: Thank you. I will certainly want to
19 discuss with plaintiffs if they expect to bring an affirmative
20 motion for summary judgment motion in the case.

21 What I'll do at this point is simply not set a
22 briefing schedule for the sanctions motion. If it is something
23 that you wish to present to the Court, I just ask that you
24 write me a subsequent premotion conference letter, perhaps
25 together with any motion in connection with any letter sent to

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1 me in connection with a motion for summary judgment. At that
2 point I'll set a briefing schedule for the motion with respect
3 to the alleged spoliation.

4 MR. STOELTING: Your Honor, if I can get a
5 clarification. The current scheduling order has a January 10
6 deadline for filing summary judgment motions. Are you asking
7 for another premotion letter if we anticipate summary judgment
8 before January 10?

9 THE COURT: Give me one second.

10 In the original case management and scheduling order,
11 which has been modified in part over the course of time, but
12 only in pertinent part, in paragraph 9 of the order you'll see
13 that I require that a premotion conference request letter be
14 sent to me no later than one week following the close of
15 discovery. If a party wishes to bring a summary judgment
16 motion, the language of the paragraph reads as follows, in
17 part: "Any motion for summary judgment will be deemed untimely
18 unless a request for a premotion conference related thereto is
19 made in writing within one week after the close of discovery."

20 So the reference that I made to a premotion letter
21 with respect to any motion for summary judgment is not a new
22 request, but it's the one that's been enshrined in the Rule 16
23 order which, as you learned from earlier in this conference, I
24 enforce.

25 MR. O'BRIEN: Absolutely, your Honor. We are